

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DONNA ANDRADE WHEATON and	:	
ROBERT WHEATON,	:	
ASHLEY WHEATON, a minor,	:	
by her father and natural	:	
guardian Robert Wheaton and	:	
MADISON WHEATON, an infant	:	
by her father and natural	:	
guardian Robert Wheaton,	:	
Plaintiffs,	:	
	:	
v.	:	CA 02-457ML
	:	
TADEUSZ SZTYKOWSKI, CENTER FOR	:	
PREVENTIVE MEDICINE,	:	
ADG CONCERNS, INC., METAGENICS,	:	
INC., ITM, and BLUE POPPY	:	
ENTERPRISES, INC.,	:	
Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Defendant Metagenics, Inc.'s Motion to Dismiss ("Motion to Dismiss")(Document #73). This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was held on May 6, 2004. For the reasons stated below, I recommend that the Motion to Dismiss be treated as a motion to compel more responsive answers, that it be granted, and that Plaintiff Donna Andrade Wheaton ("Mrs. Wheaton") be ordered to file more responsive answers within thirty days.¹

¹ At the May 6, 2004, hearing the court asked counsel for Metagenics, Inc. ("Metagenics" or "Defendant"), if Metagenics would agree to have the Motion to Dismiss treated as a motion to compel more responsive answers. Prior to making this inquiry, the court had informed counsel that it viewed dismissal as an extreme sanction which the court was unlikely to recommend given that Plaintiffs had made some attempt to comply with the court's orders. Metagenics' counsel

Basis for Motion

The basis for the Motion to Dismiss is that Mrs. Wheaton has allegedly failed to comply with three court orders: two dated March 24, 2003 (Documents #42² and #43) and one dated March 1, 2004 (Document #69). See Memorandum in Support of Defendant Metagenics, Inc.'s Motion to Dismiss ("Defendant's Mem.") at 2. The first order (Document #42) required Mrs. Wheaton to provide more responsive answers to interrogatories propounded by Metagenics, Inc. ("Metagenics" or "Defendant"), specifically interrogatories no. 3, 4, 8, 9-15, 17, 18, 20, 21, 22, and 24, on or before June 10, 2003, and in those answers to "provide information specific to Metagenics, Inc. and its product Hemagenics and ... specify the source(s) of her renal failure, be it aristolochic acid or other substance(s)." Order (Document #42). The second order (Document #43) required Mrs. Wheaton to respond more fully to Metagenics' document requests no. 7 and 10 on or before June 10, 2003. See Order (Document #43). The third order recited that Metagenics had moved on January 15, 2004, for a conditional order of dismissal, that the parties had agreed that Metagenics' motion for conditional dismissal should be granted, and that "Plaintiffs' complaint shall be dismissed as against the defendant Metagenics unless plaintiffs, on or before March 17, 2004, supplement their answers to interrogatories and responses to document requests in accordance with this Court's orders entered on or about March 12,^[3] 2004." Order (Document

replied that he felt obliged to press the Motion to Dismiss, opining that not doing so would only postpone resolution of the problem which had prompted the motion in the first place.

² This Magistrate Judge neglected to enter the date when he signed the second order (Document #42), but the document is date stamped as being filed on March 24, 2004.

³ Although the third order (Document #69) refers to "orders entered on or about March 12, 2004," it is clear that the intended reference is to the orders entered on March 24, 2003

#69).

At the May 6, 2004, hearing Metagenics indicated that subsequent to the filing of the Motion to Dismiss it had received additional documents from Plaintiffs' counsel. Therefore, Metagenics is not seeking dismissal for an alleged failure to produce documents, but only for failure to provide supplemental answers to Metagenics' interrogatories as required by the first and third orders (Documents #42 and #69).

Law

"[D]ismissal ordinarily should be employed as a sanction only when a plaintiff's misconduct is extreme." Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003). While "disobedience of court orders is inimical to the orderly administration of justice and, in and of itself, can constitute extreme misconduct," id., "dismissal should not be viewed either as a sanction of first resort or as an automatic penalty for every failure to abide by a court order," id. Rather, "[w]hen noncompliance occurs, the ordering court should consider the totality of events and then choose from the broad universe of available sanctions in an effort to fit the punishment to the severity and circumstances of the violation." Id.

Discussion

The court has reviewed Plaintiff Donna Andrade Wheaton's Supplemental Response to Metagenics, Inc.'s Interrogatories ("Supplemental Response") which she signed on or about March 17, 2004. While the court agrees with Metagenics that the Supplemental Response does not fully comply with the court's previous orders, the responses provided indicate that Mrs. Wheaton and her counsel made some attempt to comply with those orders. See Supplemental Response, especially responses to

(Documents #42 and #43), which were received in the chambers of this Magistrate Judge on March 14, 2003.

interrogatories no. 9, 10, 11, 12, 13, 14, 15. This is not a case where a party has ignored or made virtually no effort to comply with the court's orders. The Supplemental Response provides considerably more detail and information than was contained in Mrs. Wheaton's original answers. The court, therefore, considering the "totality of events," Young v. Gordon, 330 F.3d at 81, finds that the sanction of dismissal is too severe a penalty for Mrs. Wheaton's failure to fully comply with the court's orders. See id. (holding that district court should fit the punishment to the severity of the violation).

The court believes that the better course of action is to treat the Motion to Dismiss as a motion to compel more responsive answers and to require that Mrs. Wheaton provide further supplemental answers to interrogatories 3, 4, 9, 10, 11, 12, 13, 17, 20, 21, and 24.⁴ In addition, I also recommend that in providing these further supplemental answers Mrs. Wheaton comply with the following conditions:

1. Use of phrases such as "Answer by attorney," Supplemental Response at 4, "By the Attorney," id. at 5, or similar qualifying phrases in the answers shall be eliminated. While Mrs. Wheaton may state that certain information has been provided or explained to her by her attorney, her answers must indicate that she accepts and agrees with the information so provided. Otherwise, it may not be included.

2. Except for interrogatories 3, 4, and 9, if an interrogatory has separately labeled subparts (for example: a), b), c), d), etc.), each subpart is to be answered separately and the answer appropriately labeled.

3. Answers shall be complete in themselves and shall not direct Metagenics to other documents for the responsive

⁴ At the May 6, 2004, hearing counsel for Metagenics stated that he would "pass" on the answer to interrogatory no. 14.

information unless: 1) such documents can be easily identified and located and 2) the information referenced in the documents can be easily identified and extracted.

4. As to interrogatory no. 3, Mrs. Wheaton is to provide as much information as she can. If she is only able to state that she took the products listed in the interrogatory in accordance with Dr. Szytkowski's instructions, she shall so state. Mrs. Wheaton shall also state whether she deviated in any respect from those instructions.

5. As to interrogatory no. 4, Mrs. Wheaton is to identify "any other prescription, over the counter or recreational drug or dietary supplement, not described in [her] response to Interrogatory no. 3 that [she has] taken ..." between April 1, 1998,⁵ and November 2001.

6. Mrs. Wheaton shall comply with the court's order of March 24, 2003 (Document #42), and state in at least one of her supplemental responses how the product manufactured by Megetanics caused or contributed to her kidney failure.⁶

Conclusion

For the reasons stated above, I recommend that the Motion to Dismiss be treated as a motion to compel more responsive answers,

⁵ The court has intentionally advanced the start date of this period from April 1, 1996, to April 1, 1998.

⁶ In their opposition to the Motion to Dismiss, Plaintiffs state that in March of 2004 they received a medical report which confirmed that Mrs. Wheaton "did indeed suffer from Chinese Herb nephropathy." Memorandum in Support of Plaintiffs^[1] Objection to Defendant Metagenics^[2] Inc.'s Motion to Dismiss at 1. At the hearing on May 6, 2004, counsel for Plaintiffs indicated that information regarding the exact cause of Mrs. Wheaton's kidney failure was evolving and that research into the condition was ongoing. Be that as it may, Plaintiffs' Complaint was filed more than nineteen months ago. While discovery was stayed for approximately six months, at this point Metagenics is entitled to a clear statement of the alleged cause of Mrs. Wheaton's renal failure and how its product allegedly caused or contributed to that failure.

that it be granted, and that Mrs. Wheaton be required to provide those answers within thirty days and in conformity with the conditions in the preceding section.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
May 10, 2004